IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-958

HOPLAND NOKOMIS ASSOCIATION, et al.,

Petitioners,

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, et al.,

and

CYNTHIA DANIELS, et al.,

Respondents.

INDIAN RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondents Cynthia Daniels, Kate Daniels, Mitchell Jack, Frances Jack, Alice Elliott and Walter Arnold (hereinafter "Indian respondents") disagree with petitioners' characterization of the question presented by the Petition herein. Contrary to the Petition, this case does not present any constitutional, statutory or other legal question for review by this Court.

Based upon the record before the district court and the Court of Appeals, the only question presented by this case is this:

> Did the United States Court of Appeals for the Ninth Circuit err in sustaining the district court's order granting the motion of the Secretary of the Interior for entry of judgment vesting title to the "community" assets of the Hopland Rancheria in the United States of America in trust for the Indians of the Rancheria, and denying the Hopland Nokomis Association's motions to grant a longer continuance, reopen the district court's unappealed final judgment of August 3, 1978 and exclude plaintiffs' counsel from further participation in the case?

STATEMENT OF THE CASE

Petitioners' "Statement of the Case" is incomplete to the point of distortion. Indian respondents set forth a complete and accurate statement of the history of this case, so that the context and basis of the district court's orders which were affirmed by the Court of Appeals will be more readily apparent.

By this action, commenced on May 20, 1974, six Indians of the Hopland Rancheria (plaintiffs below and Indian respondents herein) sought to establish that their status as Indians and the trust status of the community assets of the Hopland Rancheria had not been lawfully terminated pursuant to the California Rancheria Act of August 18, 1958, P.L. 85-671, 72 Stat. 619, as amended by the Act of August 11, 1964, 78 Stat. 390 ("Rancheria Act"); that a trust relationship still exists between the Rancheria and the United States; that the Indians of the Rancheria are entitled to restore their community assets (which had been conveyed to the trustees of the Hopland Nokomis Association -- defendants below and petitioners herein -- under the Rancheria's distribution plan) to federal trust status; and that the Indian people of the Rancheria are entitled

to protection from the arbitrary, unreasonable and unlawful manner in which the trustees of the Association had managed the Rancheria's water system and other community assets since said assets were distributed.

The essence of plaintiffs' legal theory was that under the Rancheria Act, the United States was to fulfill several mandatory obligations as conditions precedent to the lawful termination of the trust status of the assets and the Indian status of the people of the Rancheria "pursuant to," "in accordance with," "authorized by" and/or "under the provisions of" the Rancheria Act. These obligations included the provision of water supply and distribution systems and sanitation facilities adequate to meet the reasonable and foreseeable needs of Rancheria residents; safeguarding the interests of minors and incompetents; and providing educational and vocational training programs and other benefits sufficient to enable the Indians of a Rancheria choosing to terminate their trust relationship with the United States to assimilate more easily into the surrounding non-Indian community.

Plaintiffs alleged that these conditions precedent had not been fulfilled at the Hopland Rancheria either before or after

distribution of the Rancheria's assets, and thus that neither the trust status of the community assets nor the Indian status of the people of the Rancheria ever had been lawfully terminated.

Plaintiffs' complaint also alleged that the trustees of the Hopland Nokomis Association acting either as agents of the United States or otherwise, unlawfully, arbitrarily and capriciously had managed the Rancheria's community assets -- including the Rancheria water system -- to the severe detriment of the Indians of the Rancheria, and in derogation of their federally-protected rights.

Early in the case, plaintiffs established by uncontroverted affidavits that serious improprieties existed in the conduct of the Association's affairs (C.R. 12, Excerpt of Record [E.R.] pp. 12-49), and that severe harm to Rancheria Indians had resulted from Association mismanagement of the community water system. Based upon this evidence, the district court issued a preliminary injunction preventing the Association from arbitrarily denying water service to people dependent upon the Rancheria's water system, however inadequate that system might be. (C.R. 13, Ex. R., p. 50-51).

Although the Association later denied any improprieties either in its internal operations or its management of the water system, there was no serious dispute by any party as to the fact that the Rancheria's water system was grossly inadequate prior to and at the time the United States distributed the community assets of the Rancheria to the Association's trustees and the other Rancheria assets to individual distributees.

Plaintiffs and federal defendants eventually entered into a lengthy Agreed Statement of Facts, supported by 146 exhibits, which set forth the history of the Rancheria, its water supply problems and the failure of the United States to have adequately ameliorated those problems prior or subsequent to distribution of the Rancheria's assets. Federal defendants also submitted a legal memorandum agreeing that the termination of the Rancheria had been unlawful because the conveyance of Rancheria assets had not been preceded by the provision of adequate water and sanitation facilities to the distributees. (C.R. 63, Agreed Statement of Facts; C.R. 64, Federal Defendants' Preliminary Memorandum). The Association's trustees not only refused to permit their counsel

join in the Agreed Statement, or identify those portions of the Agreed Statement with which the Association disagreed, but also discharged the second set of attorneys to have represented the Association, and undertook to represent themselves for the balance of the district court litigation.

Being unable to obtain the consent of the Association to submission of the case on an Agreed Statement of Facts, plaintiffs moved for summary judgment (C.R. 70). After the Association failed to establish either that there was any genuine issue of material fact, or that plaintiffs were not entitled to judgment as a matter of law, plaintiffs' motion was granted (C.R. 89).

The parties were unable to agree upon the manner in which the court's order granting summary judgment was to be implemented. In order to resolve these differences, plaintiffs requested that the court hold a status conference. (C.R. 80). All parties -- including the Association -- submitted statements of their respective positions on these issues (C.R. 82, 83, 84), and on June 9, 1978, with all parties present and/or represented, the status conference was held. The court issued its status conference order and final judgment on

August 3, 1978. This judgment was entered by the clerk on August 4, 1978. No appeal was taken from this judgment, nor was any motion made under F.R.C.P. Rule 59.

Under the August 3, 1978 judgment, the Indian people of the Hopland Rancheria had the right to choose whether title to the real and personal property conveyed by the United States to the trustees of the Association should be reconveyed to the United States in trust for the Indians of the Hopland Rancheria, or should remain in the trustees of the Hopland Nokomis Association, subject to supervision and control by the United States.* The choice was to be made in a referendum conducted by the B.I.A.. The judgment also established

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*The court's statement of the latter option inadvertantly omitted several words. Through a typographical error, the court's judgment omitted the words, "shall remain with the Association," from the second option. However, the choices subsequently presented to the voters at the referendum accurately reflected both the court's intent and the parties' understanding of the intent, in that the inadvertantly omitted language was included on the ballot. The court subsequently found that the error had neither confused nor prejudiced anyone, and corrected its judgment nunc pro tunc.

the eligibility criteria for participation in the referendum.

In addition to granting relief against the federal defendants, the judgment also permanently enjoined the Association and its trustees from interfering with or refusing to provide water service to the people of the Rancheria except under fair, reasonable and uniform criteria, circumstances and conditions. The Association's trustees also were ordered to file with the court quarterly reports of the Association's revenues, expenses and condition. No such report ever has been filed. [Ex. R. pp. 248-253].

Pursuant to the August 3, 1978 judgment, the B.I.A. notified the Indians of the Rancheria that the referendum would be held, and developed and distributed a tentative list of voters eligible to participate in the referendum. The notice accompanying the list afforded all persons an opportunity to protest the inclusion or omission of persons tentatively listed as eligible voters. Two trustees of the Association, apparently acting on their own, presented the B.I.A. with a list of names of persons whose eligibility was challenged; virtually all of those challenges were based upon grounds other than those specified

in the district court s final judgment.

After receiving and evaluating protests and appeals according to the criteria established in the judgment, the B.I.A. prepared, published and disseminated a final list of eligible voters. (Affidavit of Norman Sahmaunt, Ex. R. pp. 151-186; Affidavit of Charles Scott, C.R. 97, Ex. R., pp. 133-150.)

Thereafter, the B.I.A. published and disseminated notice of the date, time and place of the referendum. There has been no claim by petitioners that the people of the Rancheria did not receive adequate notice of the date, time and place of the referendum, or that either the date, time or place was inappropriate.

On the date (April 22, 1978) and the time and place specified in the referendum notice, the people of the Rancheria gathered, and an official of the B.I.A. explained the procedure of the referendum and the language and substance of the two ballot choices. The B.I.A. official responded to all questions asked by the people in attendance.

The Association was invited to select a representative to sit on an election board which was to consider challenges to the identities of prospective voters; the

Association declined the invitation.

The referendum was held, and the people of the Rancheria voted 52-5 in favor of returning the Rancheria's community assets to federal trust status. [Sahmaunt and Scott affidavits, supra].

The referendum results were certified by the B.I.A./Plaintiffs and federal defendants then made several unsuccessful attempts to persuade the Association's trustees to execute conveyances returning the Rancheria's community assets to federal trust status. Only after those unsuccessful efforts did federal defendants seek to enforce the referendum results by moving for entry of judgment vesting title, pursuant to F.R.C.P. Rule 70. The hearing on federal defendants' motion was set on shorter notice than the 21 days usually required under the local rules of the Northern District of California, because of concerns about severe water problems on the Rancheria.

Counsel for the Association had been informed in early July of the government's intention to move for post-judgment relief (Affidavit of Charles Scott, Ex. R. p. 135); nonetheless, the Association responded to the government's motion by requesting that the hearing thereon be continued, that

plaintiffs' attorneys be disqualified from further participation in the case and that the district court's judgment of August 3, 1978 be reopened. The district court granted the Association a two-day continuance in which to submit a further response to the motion.

After the continuance, the hearing was held. Based upon the evidentiary submissions and legal arguments of the parties, the court granted the government's motion for entry of judgment vesting title and denied the Association's motions to exclude plaintiffs' counsel from further participation and to reopen the court's judgment of August 3, 1978. (C.R. 106, 107).

From the judgment and those orders, the Association appealed to the Court of Appeals for the Ninth Circuit. After an expedited hearing (at the Association's request), the Court of Appeals affirmed the decision of the district court in all respects. The Court of Appeals held that the Association had failed to timely move to reopen the August 3, 1978 judgment; that the district court had not abused its discretion under F.R.C.P. Rule 60(b) in declining to reopen the judgment to reconsider the form of the referendum ballot; that the

district court's finding that there was no evidence of impropriety in the conduct of the referendum was not clearly erroneous; and that the district court had not abused its discretion in granting the Association a continuance of two days, instead of the two weeks which the Association had requested.

It is to review this judgment of the Court of Appeals that a writ of certiorari has been sought.

REASONS FOR DENYING THE WRIT

I. THE DISTRICT COURT FOUND AS A MATTER OF FACT, AND THE COURT OF APPEALS CONCURRED, THAT THE FORM OF THE BALLOT BY WHICH THE INDIANS OF THE RANCHERIA VOTED 52-5 TO RETURN THEIR COMMUNITY ASSETS TO FEDERAL TRUST STATUS WAS CONSISTENT WITH THE INTENT OF THE UNAPPEALED FINAL JUDGMENT OF THE DISTRICT COURT, AND NEITHER CONFUSED NOR MISLED REFERENDUM PARTICIPANTS.

The first reason offered by the Association for granting the writ is that there is an unsettled question as to whether its property lawfully could be conveyed to the United States as a result of an election "based on a confusing and misleading ballot." No such "unsettled question" exists, because the district court found, and the Court of Appeals concurred, that as a matter of fact the language of the ballot used in the referendum was absolutely consistent with the intent of the district court's unappealed final judgment directing that the referendum be held, and that there was no significant evidence that either the language of the ballot or the manner in which the B.I.A. conducted the referendum in any way confused, misled or intimidated the voters. Neither the district court nor the Court of Appeals found any basis for reopening the unappealed

final judgment, granting a further continuance or excluding plaintiffs' counsel from further participation in the case.

The Petition's rhetoric about "due process" is a smokescreen; the question which the Petition actually presents is whether the district court and the Court of Appeals correctly evaluated the facts presented by the parties in the proceedings on the motion for entry of judgment vesting title.

It is a well-established rule of practice that except in cases of obvious and egregious error, the Supreme Court will not grant a petition for writ of certiorari to review factual findings of the district court in which the Court of Appeals has concurred. Guzman v. Pichirilo, 369 U.S. 698 (1962); Blau v. Lehman, 368 U.S. 403 (1962). Nothing in the record in this case suggests any factual error whatsoever.

The wording of the options on the ballot at the referendum was ordered by the district court's final judgment. If the Association had noticed the typographical error, or had believed that the court's choice of words rendered the options too complicated, confusing or misleading, the Association could and should have raised

these matters with the court by moving immediately under F.R.C.P. Rule 50 to amend the judgment, or somewhat later under F.R.C.P. Rule 60 for relief from the judgment. The Association did not do so.

The Association could have appealed from the district court's August 3, 1978 judgment. It did not do so.

The Association could have filed an administrative appeal with the Secretary of the Interior protesting the referendum results, or it could have come immediately to the court, before the referendum results had been certified, and complained about the referendum procedures or the ballot language. It did neither.

The evidence before the district court showed that the Association knew perfectly well what the court intended to be included on the referendum ballot even before entry of the original final judgment, and that the ballot language was exactly what the court intended it should have been. The evidence also showed that instead of trying to cure any alleged defect or confusion in the substance or procedure of the referendum, the Association chose to do nothing about it until <u>after</u> the referendum was held and the people had voted 52-5 against the

Association trustees' continued retention of title to the Rancheria's community assets.

In summary, there simply is no credible evidence in the record to support petitioners' conclusions, speculation and assumptions about the existence or source of confusion of some other taint of the referendum process. Rather, the evidence before the district court provided an ample basis for the district court's conclusion, and the Court of Appeals' concurrence, that the people of the Rancheria freely and knowingly chose to return their community assets to federal ownership, rather than continuing to be subjected to the arbitrary and capricious whims of the Association's trustees.

Petitioners' fanciful and unsupported speculations and assumptions about the Indian community's level of awareness about the issues involved in the referendum, the elitist linguistic tendencies of bench and bar, and the purported significance of the district court's nunc pro tunc correction of a typographical error in the August 3, 1978 judgment cannot detract from the following evidence in the record:

1) the ballot was worded exactly as the district court had intended, and as the parties had understood

it would be;

2) the Indian people of the Rancheria community received ample official and unofficial notice of the purpose, date, place and time of the referendum (indeed, petitioners never have claimed that insufficient notice about the referendum was given; if anything, petitioners seem to complain that too much information was disseminated about the purpose of the referendum);

3) the B.I.A. gave ample notice of the persons entitled to vote, and provided ample time for challenges of eligibility, within the limits set by the district court's judgment;

4) at the place of the referendum, the B.I.A. explained and answered questions about the choices on the ballot, but did not allow either side to harangue the electorate at the polling place;

5) because the "challenges" to voters which petitioners wanted to make on the day of the referendum were based upon petitioners'

disagreement with the eligibility criteria established by the district court in its unappealed final judgment of August 3, 1978, rather than upon any claim that persons presenting themselves to vote were not the persons they claimed to be, the B.I.A. could not have sustained such challenges even if petitioners had been permitted to make them;

6) every person desiring to vote had a free and unobstructed opportunity to cast a secret ballot, and everyone in attendance who wished to vote did so;

7) although several unflattering remarks may have been addressed to or made about one or two of the Association's trustees, the referendum was not disrupted by disorder at the polling place;

8) prior to the referendum, no objections were expressed to the language, form or complexity of the ballot by anyone, and none of the participants in the referendum made any such objections at the polling place;

9) the Indian people of the Rancheria voted 52-5 in favor of returning their community assets to federal trust status; and

10) the Association did absolutely nothing to express its alleged dissatisfaction with the proposed or actual wording of the options presented at the referendum, or with the results of the referendum, until three months after the referendum, and then only in response to the motion by the United States for entry of judgment vesting title to the community assets of the Rancheria in the United States for the benefit of the Indians of the Hopland Rancheria.

Based upon this evidentiary record, the Court of Appeals was amply justified in sustaining the judgment and orders of the district court.

II. THE ASSOCIATION DID NOT CLAIM ANY VIOLATION OF THE FIRST OR FOURTEENTH AMENDMENTS IN EITHER THE DISTRICT COURT OR THE COURT OF APPEALS, AND THUS CANNOT RAISE SUCH A CLAIM FOR THE FIRST TIME IN THE PETITION FOR A WRIT CERTIORARI.

As a second purported reason for granting the writ, petitioners assert -- for the first time -- that the referendum ballot and procedure violated the voters' right under the First and Fourteenth Amendments to be protected from alleged confusion and deception. At no time prior to the filing of the Petition for Writ of Certiorari did the Association assert the violation of any constitutional right other than the Due Process Clause, and no "state action" has been alleged.

It is too well established to warrant extensive briefing that in all but the most compelling and significant circumstances, the Supreme Court will not reach on certiorari an issue or argument which was not also made in the district court and/or the Court of Appeals, U.S. v. Ortiz, 422 U.S. 891 (1975); Head v. New Mexico Board of Examiners, 374 U.S. 424 (1963).

The Association has neither shown nor attempted to show that the circumstances of this case are either so significant or so

compelling as to warrant a departure from this salutary rule. For this reason also the Petition should be denied.